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IN THE

Supreme Court of the United States

October Term, 1963

No. 845

378 REALTY CORP., 110TH ST. HOTEL CORP., TIMNAT ASSOCIATES, INC., PETER STUYVESANT 86TH CORP., SCHUYLER ASSOCIATES, VICTOR ASSOCIATES, INC. and ENDICOTT APARTMENT HOTEL, suing on behalf of themselves and all other owners, operators and lessees of hotels similarly situated in the City of New York,

Appellants,

v.

NEW YORK CITY RENT AND REHABILITATION ADMINISTRATION and HORTENSE W. GABEL, individually and as City Rent and Rehabilitation Administrator,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Introduction

Despite Appellees' attempt to place Appellants in a posture of challenging rent control *per se* in the City of New York, the issues presented by the instant appeal are confined to challenging *a section* of the rent control statute;

i.e., § Y51-3.0(e)(2)(c) [1] of the New York City Rent and Rehabilitation Law, (and the corresponding section of the Emergency Housing Rent Control Law of New York State [2] from which it was copied) which retrospectively and arbitrarily *reimposes* rent control on residential hotels in New York City previously decontrolled by legislative and administrative action. And the challenge to this section *is not* to the legislative wisdom in enacting the particular legislation, but rather (1) to the legislative reimposition of controls on this particular class of property without any factual basis therefor in terms of an existing emergency; (2) to the enactment of an unbridled grant of authority to an administering agency to deprive property owners of vested rights on whatever basis the agency deems appropriate; and (3) to the initial imposition on certain property owners, by the legislature, of a condition impossible of fulfillment as a necessary prerequisite to the continued enjoyment, by such property owners, of rights and benefits previously acquired.

In short, notwithstanding the "Counter Statement of Questions Presented" (Appellees' Motion to Dismiss,[3] p. 4), the instant appeal does *not* concern itself with *what* the New York State Legislature (and subsequently the City Council of the City of New York) attempted to do, but rather with the fundamental constitutional questions of what it actually did do.

In reaching these questions, two threshold points require comment. Appellees see fit to "note" (App. Mot., p. 4) what are characterized as "self-serving claims and extracts of parts of incomplete administrative proceedings which are pending determination in the City rent agency,"

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[1] Formerly § Y41-3.0(e)(2)(c); renumbered by c. 100, Local Law 1963, eff. March 19, 1963.

[2] Ch. 337, Laws of 1961, § 2(2)(b).

[3] Hereafter referred to as (App. Mot., p. —).

and claim that "[t]hese materials are not properly here, * * *." Suffice it to say at this juncture that any factual material referred to in the Jurisdictional Statement is supported by the record before this Court, *is uncontradicted in the record* and illustrates the manifest vices of the challenged statutes.

Furthermore, Appellees' argument that the challenged amendments to the Emergency Housing Rent Control Law were "clarificatory" of the existing rent control law, while successfully foisted upon and accepted by the New York State Legislature (1959 McKinney's, *Session Laws of New York*, p. 1835), and adopted by the New York Courts (see, *Matter of Noxon Operating Corporation* v. *Herman*, 32 Misc. 2d 557, aff'd 16 A D 2d 774, aff'd w/o op. 13 N Y 2d 604) flies in the very face of the statutory history of rent control as it existed under the federal government (1943 to 1950) and under the State of New York at the time of its "take-over" of such controls in 1950 and thereafter until 1961.

Additionally, Appellee's unilateral foisting upon appellants of a position vis-a-vis the "predicate for these housing rent control laws" (App. Mot., p. 14) is unwelcome and unwarranted. Even a cursory reading of the Jurisdictional Statement makes clear that appellants take no position concerning "the continuance of the housing emergency", that not being at all relevant to this appeal, but rather dispute the existence of an emergency *relating to hotel accommodations*. This last is one underlying predicate for the particular "rent control laws" here challenged.

Argument

1. The "base date":—

Appellants and Appellees both stress March 1, 1950 as the key date involved in the proper interpretation of the 1961 amendment to § 2(b) of the New York State Emergency Housing Rent Control Law and the successor pro-

vision of the New York City Rent and Rehabilitation Law. And the emphasis is properly placed for it is this date, and its role in the State scheme of rent control of residential hotels, which gives principal rise to the Appellants' rights and makes confiscatory their summary divestment by subsequent legislation. Throughout their motion to dismiss, Appellees continually emphasize that March 1, 1950 is the "admitted base date"—which it is—and then proceed to argue from a false premise, *i.e.*, that this date, as adopted by the initial State Rent Control Act and Regulations, effected no change in the pre-existing federal rent laws and merely provided an harmonious blending of the old with the new. Appellants' purported confusion as to this statutory harmony is ascribed, by appellees, as the underlying basis for this, to them, meritless appeal (App. Mot., p. 6).

Unfortunately, Appellees have not, do not and will not read their statutory history. This history clearly demonstrates that when the State Rent Administrator, and subsequently the Legislature, adopted a regulation *fixing* March 1, 1950 as the qualifying date for the acquisition of "hotel status" *a brand new criterion was established within the statutory scheme of rent control.* It was then established, for the first time, that insofar as hotels were concerned the key consideration for decontrol was what the premises were, *in fact*, on March 1, 1950 and *not* what the federal classification was on that date.

Appellees finally agree—at least they so state (App. Mot., p. 8)—that under the Housing and Rent Act of 1949, the only hotel premises which were recognized as such by the federal rent control authorities were those which were regarded as such in the community on June 30, 1947. No matter what had occurred to a particular premises subsequent to June 30, 1947, it was of no consequence to the federal scheme of controls and any prior classification was carried forward intact until the State took over control responsibility in 1950. In this light, Appellees insist that

the federal classification on March 1, 1950 (and not what the premises were in fact on that date) was the sole determination of the forevermore classification of a particular premises. Appellees ignore the plain fact that the first State Rent Administrator, McGoldrick, recognized that change could, and did, take place between June 30, 1947 and March 1, 1950 and that additional hotels had come into being. Acting within the purview of his statutory authority, the then Administrator said, in effect, "Let's forget what the Federal government did or did not do concerning *classification* of these properties (hotels) but rather let's see what the premises *actually were* on March 1, 1950". Rent and Eviction Regulation §3(10), effective May 1, 1950,[4] was promulgated to incorporate this approach and from the very outset of its assumption of control, the State Rent Commission established a brand new criterion for the decontrol of residential hotels.[5]

Nor is the foregoing pure conjecture by Appellants as to the mental processes employed by Administrator McGoldrick when the first Rent and Eviction Regulations were promulgated. The uncontradicted record before this Court contains a complete copy of the Administrator's opinion in *Matter of Bayron* (Ex. pp. 121-127) which clearly sets forth all of the foregoing and for all to see. Moreover, the uncontradicted record details the establishment of procedures by the Administrator, whereby the *factual* status of each premises as of *March 1, 1950* was established and decontrol resulted where justified.[6]

In arguing around the uncontradicted record, Appellees assert that great significance should be attached to the

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[4] R. 38. This regulation was approved and ratified by the Legislature in 1951 by L. 1951, c. 443, § 2, eff. April 2, 1951.

[5] Transient hotels had been continued as decontrolled premises by the first State Rent Act (R. 37).

[6] *See*, Jurisdictional Statement at pp. 9-10.

mass of "meticulously kept" records of the federal government, all of which were acquired by the State Rent Commission when it assumed jurisdiction in 1950. They then argue that under the "clarificatory" (i.e., restatement of what, after all, was existing law at the time) amendment of 1961, the present Administrator need only refer to these voluminous records to immediately ascertain "what the establishment was under the then federal rent law on that base date", March 1, 1950 (App. Mot., p. 14) because that fact is conclusive of its status today and forevermore.

The fallacy of this argument is that if this is all the present Administrator need do in order to ascertain the status of an establishment under the law, as they hold it always was, then this is all that Administrator McGoldrick need have done in 1950, 1951 and 1952 and there would have been no need for procedures under which proofs *de novo* were taken as to the *factual* status, as opposed to classification status, of a particular premises on the base date of March 1, 1950. But since the State Law *changed* then existing law, it was necessary for the proofs to be taken, as they were, of the facts relevant to a particular establishment under the new law as so changed. And no amount of equivocal argument can alter the historical fact that the law was so changed.

When, in 1961, the Legislature was induced to amend the definition of a hotel in the Rent Control Law, it again effected a major *substantive* change in the decontrol provisions of the statute and without a reasonable relationship to any purpose sought to be served thereby, mandated that previously acquired "decontrol status" would henceforth be determined by the identification or classification pursuant to the Federal Act. Although the then existing facts of life concerning many establishments not previously "identified or classified as a 'hotel', 'transient hotel' or 'residential hotel' pursuant to the Federal Act" impelled an earlier rejection of this test for decontrol

(*supra*, pp. 4-6), eleven years later the Legislature, claiming to merely restate existing law, summarily deprives Appellants of valuable vested rights in their properties by imposing a *new* condition impossible of fulfillment. Such deprivation, we submit, is tantamount to deprivation without due process of law and patently unconstitutional.

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2. The lack of statutory standards:—

Wholly aside from the retrospective aspect of the challenged statutory provisions, this Court has held that a statute which *does* prescribe standards "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards" does not constitute an unauthorized delegation of legislative power and does not offend against the constitutional requirement of due process. *Yakus* v. *United States*, 321 U. S. 414, 426 (1943). Conversely, of course, a statute which *does not* prescribe sufficient standards by which the Legislature, the courts[7], the general public[8], or even the Mayor of the City of New York[9] (whose rent control agency and Rent Administrator are Appellees herein) can ascertain the underlying predicates and uniformity of administrative action *does* offend the due process requirement of the constitution and is clearly invalid.

Appellants argued below, and have submitted to this Court[10] that the challenged statutes lack such definite standards, if any standards at all. Appellees on the other hand have chosen to ignore this issue and have not, as they can-

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[7] *E.g., Matter of Bayview Hotel, Inc.* (1963), 12 N. Y. 2d 425.

[8] R. 52-56; R. 79-80 and Ex. pp. 1-5; R. 83-85 and Ex. pp. 6-83; R. 109-111 and Ex. pp. 93-100, 101-118.

[9] See, Jurisdictional Statement, p. 16, fn. 7.

[10] Jurisdictional Statement, p. 4, question 2, *id.*, pp. 15-16.

not, advanced the slightest refutation of the uncontradicted, documented facts set forth in the record before this Court. Rather, Appellees rely on generalized labeling of premises as "pseudo" or "decayed" hotels, which clearly the representative Appellants are not[11]; the Schuyler Arms, National and Peter Stuyvesant Hotels have been established hotel premises for upwards of fifty years; the Cambridge Hotel has been a recognized residential hotel for more than twenty years (R. 83-84) and modernized and maintained as such; and the West End Plaza, Imperial Court and Endicott Apartment Hotels are formerly non-hotel premises which were converted, at great cost (R. 79-80; 87-88; 109-110), into residential hotel premises.

Despite the foregoing *facts*, and despite their very own inspection reports to the contrary[12], Appellees, acting pursuant to the blanket, unfettered authority granted by the New York Legislature, determined that the affected premises (and many more similarly situated) were either "pseudo" hotels or "decayed" hotels.

But, on what bases were these determinations made?

Clearly, the "opinion" hotels were not "pseudo" hotels but were, in fact, hotels within the purview of the statutory criteria established by the Legislature and were specifically found to be so by the Rent Administrator[13]. And, those hotels which had been such before as well as during the federal rent control period were certainly not "pseudo" under *any* interpretation of the State Act.

The determination of what constitutes, for Appellees, a "decayed" hotel is even more difficult. Appellants have contended, and still contend, that the statute provides no help in this regard.

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[11] Ftn. 8, *supra*.

[12] R. 80, Ex. pp. 1-2; R. 110, Ex. pp. 93-100, 101-118; R. 88-89, Ex. pp. 84-86.

[13] *Supra*, pp. 4-6.

When, for example, does a hotel furnish the "customary hotel services", or fail to do so, so that it "can no longer quality for [hotel] status"? Quite clearly the law does not say. True, an establishment contending for "hotel status" must "*customarily* provide hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures and bellboy service", but in accord with what "custom"? Is it that of its immediate neighbor, or rather of some other establishment located in a different part of the same county or even a different county of the City of New York? And, is the "custom" to be different if the establishment is strictly a residential hotel catering to weekly or monthly tenants as distinguished from one strictly transient in operation?[14] Moreover, when the law speaks of services "such as" maid service, etc., does it mean that these specified services *must be rendered* or is the phrase included purely for purposes of definition?[15] To continue is to labor the point but, manifestly, more questions can well be asked than answers given. Appellees, needless to say, have never given any answers and do not yet in this Court.

Some reliance is placed, by Appellees, on the New York Court of Appeals' decisions in *Matter of Bayview Hotel, Inc.* v. *Temporary State Housing Rent Commission*, 12 N Y 2d 423 (1963); *Proche* v. *McGoldrick*, 307 N. Y. 760 (1954); and the very case now in this Court by this appeal, *378 Realty Corp.* v. *New York City Rent and Rehabilitation*

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[14] See, *e.g.*, *Emergency Price Control Extension Act of 1946* (R. 34).

[15] Appellees seemingly concede that "insofar as hotels are concerned, the Legislature did not attempt any new definition or formula of what constitutes a hotel" from that which existed under the federal law (App. Mot., p. 7). Accepting this *to the extent of* the "services" requirement, the federal requirement was *considerably less* than the State and City Administrators contend is now required. *See*, R. 45 at ftn. 5 and authorities cited.

Administration, 13 N Y 2d 817 (1963), as well as the decision of the Appellate Division of the New York Supreme Court, First Department, in *Matter of Hotel Armstrong* v. *Temporary State Housing Rent Commission*, 11 A D 2d 395. The court below, at Special Term, also relied heavily on *Armstrong* in finding sufficient "statutory standards" to warrant granting the judgment of constitutionality affirmed in the Court of Appeals below and now here on appeal. We submit, however, that such reliance is misplaced.

A careful reading of *Baycrest*, *supra*, makes clear that in reaching the decision it did, the New York Court of Appeals did not pass on the issues involved in the instant appeal for it was not necessary for that Court to reach them. The opinion of Judge Burke clearly indicates that, in the view of the Court, *the extensive renovations made to the vacant premises, subsequent to acquisition by the new owners, and the nature of the operation commenced by the new owners in 19* destroyed it as a hotel in fact and in the community in which located and therefore subjected it to re-control by "operation of law." The Court, as it stated, (12 N Y 2d at 428) found it unnecessary to consider the question of the 1959 amendments to § 2(b) of the State rent control law; the "Federal status" requirement of the 1961 amendment to § 2(b), not being before the Court, was not passed upon.

An equally careful reading of *Proche*, *supra*, also makes clear, that both the decision of the Appellate Division, Second Department, 283 App. Div. 728-729, and the affirmance by the Court of Appeals, *without opinion*, 307 N. Y. 760, were narrowly confined to the particular facts of that case and do not remotely support the broad proposition contended for by Appellees (App. Mot., p. 6).

No comment is required relative to the citation, by Appellees, of the lower court's determination of the issues involved in this very appeal as authority for anything in this Court.

Finally, the Justice at Special Term below relied heavily on *Armstrong* [16] for his conclusion of constitutional validity of the challenged statutes and regulations. But the Apellate Division of the New York Supreme Court, in *Armstrong*, was *not* considering the underlying question of whether the statute challenged there contained constitutionally acceptable standards upon which to predicate recontrol of previously decontrolled hotel premises. *It presumed constitutionally valid recontrol in the first instance* and confined itself to considering whether sufficient standards existed *for the fixing of maximum rentals in such recontrolled premises.* The reliance upon *Armstrong* as authority for the cardinal "standards" issue present in *this* appeal was and is, we submit, misplaced.

There is no decisional determination in New York squarely holding that the statutes in question do or do not contain the requisite constitutional standards either for the guidance of the administering agency in first determining the appropriate hotel status of a particular establishment, or for the guidance of the courts and general public in determining whether the legislative will—whatever that may be—is being carried out by the Administrator. Appellants have urged below and urge here that no such standards do exist and the statute is constitutionally invalid by reason thereof. It is submitted that Appellees' continuous refusal to meet this issue in any of the lower courts, or in this Court, lends visible support to Appellants' contention. It is an important issue, presently and properly before this Court, and one we believe this Court should pass upon.

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3. The "hotel emergency":—

Appellants have heretofore argued in the courts below and urge upon this Court that the challenged statutes bear

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[16] *Matter of Hotel Armstrong v. Temporary State Housing Rent Commission*, 11 A D 2d 395.

Administration, 13 N Y 2d 817 (1963), as well as the decision of the Appellate Division of the New York Supreme Court, First Department, in *Matter of Hotel Armstrong* v. *Temporary State Housing Rent Commission*, 11 A D 2d 395. The court below, at Special Term, also relied heavily on *Armstrong* in finding sufficient "statutory standards" to warrant granting the judgment of constitutionality affirmed in the Court of Appeals below and now here on appeal. We submit, however, that such reliance is misplaced.

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[16] *Matter of Hotel Armstrong* v. *Temporary State Housing Rent Commission*, 11 A D 2d 395.

no reasonable relationship, either factually or logically, to any *new* emergency found by either legislative body to exist with regard to hotels accommodations.[17] In fact, quite the contrary was true at the times of enactment and is still true today.[18] Without such relationship and application of the statute to an actual and manifest evil justifying the employment of the police power of the state and city, the statutes violate the fundamental principles of due process and are unconstitutional. *Nebbia* v. *New York*, 291 U. S. 502 (1934). Appellees have consistently failed to meet this issue below, as indeed they could not, and still do not meet it in this Court. We attach significance to their silence.

The uncontradicted record and the expert opinion contained therein, plainly demonstrate[19] that the uncontrolled and *ad hoc* determinations of Appellees substantially threaten both the economic base of a consequential industry in the City of New York and of each entrepreneur engaged therein.

This Court requires no argument that substantial economic advantages accrue to any business that is free from restrictive controls. The traditional and practical controls imposed by the market place are more than sufficient to impel owners and operators of any business to look to the quality of their product if they hope to survive. This is no less true of an owner or operator of a hotel—whether transient or residential—particularly when faced with a declining, i.e., more competitive, market. And this is precisely what the New York State Commission to Study Rents and Rental Conditions found to be the existing facts of

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[17] Jurisdictional Statement, pp. 17-18.

[18] *Ibid.*

[19] R. 74, Ex. p. 92; R. 95-103.

"hotel accommodation" life in 1957,[20] two years *prior* to the first amendment of the State Rent Control Law affecting hotel properties[21] and four years prior to the challenged state amendment involved herein. The New York City Council "found" nothing different; it "found" nothing at all (R. 52-53).

Where, therefore, the rent control statutes to which the challenged amendments are appended are bottomed upon legislative findings of the existence of an "acute shortage of dwellings" as an aftermath of the last war necessitating the continuance of controls in order to prevent "disruptive practices and abnormal conditions"[22], and where, despite the foregoing, controls on residential hotels had been deemed unnecessary for a period of eleven years prior to the enactment of the 1961 amendment to § 2(b) of the State Act, the reimposition of such controls without a factual base or finding of a *new* and compelling emergency resulting in an "acute shortage of dwellings" and the known concomitants thereof is an improper and invalid exercise of the police power. The resulting confiscation of the vested property rights of Appellants is without due process of law and unconstitutional. The courts below have denied Appellants relief and this Court is the only tribunal wherein such relief may be obtained.

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[20] McKinney's, 1957 *Session Laws of New York* at pp. 1535, *et seq.*

[21] L. 1959, c. 695, § 2(b).

[22] L. 1946, c. 274, § 1, as amended, Mck., *Unconsol. Laws*, Vol. 65, Part 3, § 8581; New York City Administrative Code, Title Y, § Y51-1.0

CONCLUSION

By reason of the foregoing, and the reasons advanced in the Jurisdictional Statement heretofore filed with this Court, Appellees' motion to dismiss the instant appeal or in the alternative to affirm the judgment below should be denied and this appeal should be accepted and decided by this Court.

Respectfully submitted,

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